

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,
Plaintiffs,

vs.

Case No. 00-10059-01JTM

LARRY J. BATTLE, JR.,
Defendant.

ORDER

Presently before the court is defendant Larry Battle, Jr.'s (Battle's) motion to modify an imposed term of imprisonment (Dkt. No. 278), and motion to vacate (Dkt. No. 279). For the following reasons, the court denies the motions.

Mr. Battle seeks a reduction of his prison term pursuant to 18 U.S.C. 3582(c)(2). In support of his motion, Mr. Battle states that his guidelines should be recalculated using amendment 709, which became effective November 1, 2007. However, that amendment is not retroactive, and thus has no applicability in this case. *See* 18 U.S.C. § 3582(c)(2); *Federal Sentencing Guidelines* § 1B1.10(c), 1B1.10 (*application note #1A*); *United States v. Soto-Diarte*, No. 06-20142-03, 2008 WL 4951414, at *1, FN 1 (D. Kan. Nov. 14, 2008). Because a court may only reduce a defendant's sentence if the "term of imprisonment was based on a sentencing range

that has subsequently been lowered by the Sentencing Commission [if] such a reduction is consistent with applicable policy statement issued,” Mr. Battle’s request is denied. 18 U.S.C. § 3582(c)(2)

Mr. Battle also requests that this court re-sentence him due to an alleged error in jury instructions and charging decisions. Essentially, Mr. Battle claims that the government erred by charging him with violating two separate and distinct statutory provisions in the same count and in the jury instructions, and further argues that joinder of two counts in a single trial was prejudicial. Battle’s argument lacks merit, as it is entirely proper to join several charges against a single defendant in a criminal case. Further, upon review of the jury instructions in this case, it is clear that the second statute was mentioned only for the purpose of defining a portion of the charged statute. As such, the motion is denied.

IT IS ACCORDINGLY ORDERED this 28th day of January, 2009 that Larry Battle Jr.’s motion to modify an imposed term of imprisonment (Dkt. No. 278), and motion to vacate (Dkt. No. 279) are denied.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE